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Supreme Court of the United States

OCTOBER TERM, 1947

No. 40

SCHINE CHAIN THEATRES, INC., ET AL.,
Appellants,

against

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE.

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., ET AL.,
Appellants,

—against—

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for some of the theatre owners and operators, injury to whose business forms the basis for the judgment of the District Court, respectfully moves this Honorable Court for leave to file the accompanying brief in the above-entitled case. The appellee, but not the appellants, has consented to the filing of the brief.

December, 1947.

Respectfully submitted,

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William C. Smalley,
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and their corporate
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Amici Curiae.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 10

SCHINE CHAIN THEATRES, INC., ET AL.,
Appellants,

—against—

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF AMICI CURIAE.

OPINION BELOW.

The opinion of the District Court on the merits is reported at R. 3066 and at 63 F. Supp. 229.

STATUTES INVOLVED.

Section 4 of the Clayton Act (15 U. S. C. § 15) provides:

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 5 of the Clayton Act (15 U. S. C. § 16) provides:

> That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting, which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.
>
> Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

STATEMENT OF POSITION OF THE AMICI CURIAE.

The *amici curiae* concur in the position of the United States, the appellee, in this Court. They agree that the findings of fact made by the District Court are sufficient to support the decree. They urge, therefore, that the judgment of the District Court be affirmed.

Such an affirmance will necessitate a remand to the District Court for the purpose of supervising the effectuation of the decree. The *amici curiae* submit that this Court, in affirming the judgment, should either direct that the District Court make more complete findings of fact, or, at the least,

indicate to the District Court that the judgment of this Court is without prejudice to the making of such findings. Only if such findings are made can there be realized the full purpose of Congress in enacting section 5 of the Clayton Act. That purpose makes it mandatory for the District Court to make complete findings of fact as to all issues presented at the trial relating to the injury of the individual theatre owners and operators resulting from the defendants' activities in violation of the antitrust laws.

ARGUMENT.

The purpose of the *amici curiae* in submitting this brief is to secure the assistance of this Court in making effective one of the principal sanctions provided by Congress to enforce the antitrust laws. To this end, we request that the Court, upon the remand of this case, which will follow affirmance, either direct the District Court to make more complete findings, or, at the very least, indicate to the District Court that the judgment of this Court is without prejudice to the making of such findings.

In 1914, section 4 of the Clayton Act was enacted to provide federal statutory relief for those persons who were injured by acts in transgression of the federal antitrust laws.[1] Congress provided in that section that the persons so injured were entitled to treble damages. Further to inhibit such transgressions, Congress provided in section 5 of the Act, that the wronged persons were entitled to the benefit of a judgment secured by the United States against the malefactors.[2]

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[1] This section is set out at p. 2, *supra*. 38 Stat. 731 (1914); 15 U. S. C. §15. Section 4 of the Clayton Act replaced section 7 of the Sherman Law, 26 Stat. 210 (1890) and section 77 of the Wilson Tariff Act, 28 Stat. 570 (1894). As to this history, see *United States* v. *Cooper Corporation*, 312 U. S. 600, 608-609 (1941).

[2] This section is set out at p. 3, *supra*. 38 Stat. 731 (1914); 15 U. S. C. §16.

It was, of course, clear that without such statute a judgment or decree obtained by the United States against a violator of the antitrust laws could not be admitted into evidence or used as an estoppel by a private litigant suing for treble damages. See *Buckeye Powder Co.* v. *E. I. DuPont Powder Co.*, 248 U. S. 55, 63 (1918).

It is with section 5 of the Clayton Act that this brief is primarily concerned. For that reason, we set forth here a short statement of its history in the Congress.

As the Judiciary Committees state in their reports, this section was "in keeping with a recommendation made by the President [Wilson] in his message to Congress, on the general subject of trusts and monopolies."[3] The President, in his message to Congress on January 20, 1914, said:

> "There is another matter in which imperative considerations of justice and fair play suggest thoughtful remedial action. Not only do many of the combinations effected or sought to be effected in the industrial world work an injustice upon the public in general: they also directly and seriously injure the individuals who are put out of business in one unfair way or another by the many dislodging and exterminating forces of combination. I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combinations complained of and won its suit, and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience."

The bill, as first drafted, provided that a decree in an equity suit between the Government and a party accused of monopolistic practices should be a conclusive estoppel, not only between the parties to the action, but as to all others,

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[3] H. R. Rep. No. 627, 63rd Cong. 2d Sess. (1914) 14; S. Rep. No. 698, 63rd Cong. 2d Sess. (1914) 10.

whether the decree was in favor of the Government or of the defendant.[6] Two vital amendments to this section were made before the bill became a law.[8] The first of these amendments eliminated the availability of a decree in favor of the defendant as an estoppel against third parties.[8] The change was brought about primarily to avoid a question of the constitutionality of creating an estoppel against a person who is not a party to the Government suit.[7] This amendment may be attributed also to a feeling among the legislators that a mutual estoppel would unfairly benefit the defendants.[8] The second amendment changed the effect of the estoppel from a conclusive one to one of *prima facie* value only.[9] The reason for this change was a fear that any conclusive estoppel would be unconstitutional.[10]

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[6] "That whenever in any suit or proceeding in equity hereafter brought by or on behalf of the United States under any of the antitrust laws there shall have been rendered a final judgment or decree to the effect that a defendant has or has not entered into a contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, or has or has not monopolized, or attempted to monopolize or combined with any person or persons to monopolize, any part of commerce, in violation of any of the antitrust laws, said judgment or decree shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the United States and such defendant, constitute in favor of or against such defendant conclusive evidence of the same facts, and be conclusive as to the same questions of law in favor of or against any other party in any action or proceeding brought under or involving the provisions of any of the antitrust laws." 51 Cong. Rec. 9487.

[8] In fact four important amendments to this section were made. But two of these are not relevant here. They provide that no estoppel is available where there is a consent decree or a decree is entered prior to the introduction of any testimony, and that an estoppel exists though the Government action is a criminal suit.

[8] 51 Cong. Rec. 15589.

[7] *Id.* at 9487 *et seq.*

[8] *E.g., id.* at 9079, 9169, 9491, 9493.

[9] *Id.* at 15589.

[10] The Senate Committee stated at 51 Cong. Rec. 13851:

> "The material difference between the House provision and the Senate amendment is, of course, whether the decree in favor of the Government shall be prima facie evidence against the same defendant in a subsequent suit by another party or be conclusive against such defendant. The committee think there are considerations of public policy which favor the House provision of conclusiveness; but in the state of the decisions of the Supreme Court of the United States in kindred cases they believe the law should go no further than to make the decree prima facie evidence."

See also *id.* at 13851-56, 13898-99.

The purpose behind the enactment of this section is not in doubt. A reading of the Presidential message,[11] the committee reports,[12] and the debates of Congress,[13] quickly reveals that the section was put into the statute to permit a person successfully to bring a treble damage suit. The objective was to avoid the necessity for a plaintiff to prove again all of the matters already proved by the United States. Congress feared that the practically prohibitive cost in time and money that would be necessary to establish those matters which had already been established by the Government would be an unfortunate deterrent to such actions. It, therefore, provided for the use of the Government decree as an estoppel, so that a plaintiff need do no more than introduce that decree, prove the amount of damages, and rest.[14]

Today, more than thirty years after the enactment of the Clayton Act, enforcement of the antitrust laws by way of treble damage actions which rely on prior governmental decrees has proved more a myth than a reality. "There seems to be no case in which a Government decree had any weight with the court." [15]

Many explanations are given for the failure as a practical matter of the treble damage remedy. Doubtless, the businessman's understandable desire to remain in the occupation festered with the illegal practices, his unwillingness to engage in protracted, vexatiously defended, and costly litigation to secure relief due as of right, and the difficulty of proving damages are some of the reasons for this failure.[16] One

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[11] See page 5, *supra*.

[12] See note 3, *supra*.

[13] 51 Cong. Rec. 9073, 9079, 9169, 9487-95, 16276, 16319, 13659, 13849-59, 13897-902, 13906-907, 14214, 15589, 15822-27, 15938-39, 16003, 16046, 16058-59, 16149.

[14] See 51 Cong. Rec. at 9492-93, 13851, 15822-23, 15825, 16003.

[15] Note, *Procedure In Private Suits Under The Sherman and Clayton Acts* (1932) 32 Col. L. Rev. 335, 342-43 and n. 55; see also Comment, *Fifty Years Of Sherman Act Enforcement* (1939) 49 Yale L. J. 284, 296-99.

[16] See, *e.g.*, S. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 8:

"Private remedies in damages for violations of the antitrust law have been authorized since its first enactment; but their use has been much impeded, due partly to the speculative character of damages based on loss of business, and to the limited facilities of private parties for obtaining evidence of a kind to satisfy the narrow requirements of the common law, to which such suits were unknown."

of the major causes for the inability of the courts to utilize a prior decree obtained by the Government, however, has been that the normal findings supporting such decrees are not sufficiently comprehensive to be of real assistance to a plaintiff in a treble damage action. In such an action, a plaintiff wants to be able to show by the Government decree not only that there was a monopoly or an attempt to monopolize or combination or conspiracy in restraint of trade, but he also wants to use the prior decree to demonstrate that he was directly affected by the illegal activities of the defendant. And yet the normal findings do not bring home the particular reasons on which the general decree must rest. The District Court should vindicate—by particular findings—the Congressional purposes which includes the sanction of the private suit to follow the decree in the Government's case. If the decree or the findings which support the decree do not state in particular the injury which has occurred, the plaintiff is unnecessarily obliged in his treble damage action to prove not only damages but also a connection between the defendant's illegal activity and the injury to his own business. Section 5 was enacted for the very purpose of removing such a barrier to successful prosecution of treble damage suits. "In such situations society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation." Mr. Justice Frankfurter, dissenting, in *Priebe & Sons, Inc.* v. *United States*, No. 16, October Term, 1947.

The case before the Court provides an illustration of a litigant's difficulty where the findings are inadequate. In this case evidence was presented by the United States in the District Court showing that the defendants had committed violations of sections 1 and 2 of the Sherman Law with reference to certain theatres owned or leased by private exhibitors, some of whom are *amici curiae* here. Yet, in many instances, the District Court made no findings with respect to such violations. It made no findings despite the fact that the Government strenuously urged that these vio-

lations had occurred and despite the fact that the defendants sought to rebut the proof offered by the Government. Thus, on the present state of the record, when the treble damage action now contemplated is instituted, these injured exhibitors will be forced—against the Congressional intent—to retry the issues of the defendants' activities respecting themselves and their theatres.[17] Consequently much of the proof respecting these exhibitors adduced by the United States in this case will have to be presented again in the treble damage suit. Yet this waste of time, energy, and money can be avoided and the treble damage remedy made effective, if the District Court on remand of this case makes findings respecting these exhibitors and their theatres.

It is our contention that the Congressional purpose behind section 5 can be fulfilled only if adequate findings of fact are made in Government equity antitrust actions.[18] Judicial

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[17] Two examples of the District Court's failure to make findings of fact suffice for this brief.

No finding of fact was made as to the activities of the defendants with respect to the Syracuse-Strand Theatre in Syracuse. This theatre was owned by the Syracuse-Strand Corporation and leased to the Schines. In 1941 the Schines refused to pay a higher theatre rent, although operating expenses necessitated the raise in rental, and the lease was terminated. Subsequently, a corporation known as the Syracuse Community Theatre Corporation was formed to operate the theatre, Hubert P. Wallace and the Syracuse-Strand Corporation each held a half interest. According to the evidence, on which findings should have been made, the Empire Theatre, in which the defendants were interested, was reopened after it had been closed for six months. Inferentially, this reopening was undertaken in order to frustrate the operation of the Syracuse-Strand Theatre as a competitor of the local Schine Circuit. The Empire Theatre was reopened for this purpose a week before the opening of its competitor. The Syracuse-Strand Theatre was unable to obtain any "good product" from the major distributors because the Schine theatres, including the Empire, in Syracuse had preempted all the desirable product. Because of the poor quality of the remaining product, the Syracuse-Strand Theatre was forced to close after a few months' operation. R. 1978-2010, 2015-25, 2102-31, 2132-72.

Nor did the Court make findings of fact relating to the clearance obtained by the defendants over theatres owned by William C. Smalley in Cooperstown, Delphi, Dolgeville, Oxford, St. Johnsville, and Sydney. *E.g.*, R. 2444-46, 2448-59, 5633, 5870, 6088.

[18] *Cf.* colloquy between Senators Walsh and Cummins at 51 Cong. Rec. 13901:

> "[Mr. Cummins] Now, if the thing was a single transaction, if it was a single act, there would be no difficulty about it; but when the thing forbidden, or the thing of which the Standard Oil Co. was found guilty, is a long series of acts and combinations and incorporations, it is my opinion that what we propose to do now, whether we make it prima facie

husbandry dictates that "What was involved and determined in the former suit should be tested by an examination of the record proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court * * *." *Oklahoma v. Texas*, 256 U. S. 70, 88 (1921).[19]

Although it perhaps be true that general litigation may not demand findings of fact as to all matters in controversy,[20] we submit that by the enactment of section 5 of the Clayton Act, Congress removed Government antitrust suits from this general category. In section 5 of the Act, Congress expressly provided that a plaintiff in a treble damage

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evidence or whether we make it conclusive evidence, will be of little avail to the person who sues to recover. I think he will still have to show that the thing by which he was hurt was a violation of the antitrust law, and in nine cases out of ten the decree does not adjudge that that particular thing was a violation of the antitrust law. I should like in some way, although I do not know how we could do it, to make it much clearer than it is.

Mr. WALSH. Mr. President——

The VICE-PRESIDENT. Does the Senator from Iowa yield to the Senator from Montana?

Mr. CUMMINS. I yield.

Mr. WALSH. I was going to suggest to the Senator from Iowa that I assume that in all of these cases findings of fact are made.

Mr. CUMMINS. Oh, no.

Mr. WALSH. It may be charged, for instance, that local price cutting was practiced with intent to drive Jones or Smith or some one else out of business, and——

Mr. CUMMINS. I think there are very few cases in which there are findings of fact of the sort the Senator from Montana has in mind.

Mr. WALSH. If that is the case, the rule of implied findings would apply."

[19] "It is said that the statutes of Idaho do not provide for findings of fact in a case like this; and that therefore the recitals in such findings must be ignored. If it be proved that the statutes of Idaho do not authorize findings of fact, it is none the less true that such findings are declarations by the court of the matter it determines. Even if not conclusive as against all testimony, they are certainly persuasive evidence of what the court did in fact decide." *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 690 (1895).

"These findings were pertinent to the issues, and upon them the Court pronounced its decree. Under a familiar rule the facts thus determined are not open to dispute in a subsequent suit between the same States." *Wyoming v. Colorado*, 286 U. S. 494, 507 (1932).

[20] Recent commentators, however, have recognized that one of the reasons for making findings of fact is that the parties in future litigation may be able, for purposes of estoppel, to know precisely what was decided. Note of the Advisory Committee to Rule 52 of the Amended Federal Rules of Civil Procedure; Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F. R. D. 25, 26-27 (1940). *Cf. Minneapolis-Honeywell Regulation Co. v. Thermoco*, 116 F. (2d) 845 (C. C. A. 2, 1941).

action should have the *benefit* of a decree in a prior Government suit "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." The doctrine of estoppel so expressly incorporated is that parties in a subsequent suit on a different cause of action are concluded by everything that was actually litigated and determined between them in a prior suit.[21] Inadequate findings necessarily create difficulty in applying this doctrine by leaving in doubt exactly what was litigated and decided in the earlier suit.[22] The benefit of the statute is lost where the case is such that any one series of facts will support a judgment, and because of inadequate findings it is not possible to say which series of facts the court relied upon in reaching its decision. The only real solution is to require, in a Government antitrust suit involving proof of more than one series of facts, that the trial court make findings as to each of the issues presented to it so that such findings may be available to establish the Congressionally intended estoppel.[23] Unless the plaintiff in the subsequent action can show the court that the litigation between the defendant and the United States established both the fact of violation and the impact of this violation on the plaintiff, the sanction of section 5 becomes lip-service doctrine—useless to the injured person—and the Congressional mandate is annulled by default.

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[21] *Cromwell* v. *County of Sac.*, 94 U. S. 351 (1877); Scott, *Collateral Estoppel by Judgment* (1942) 56 Harv. L. Rev. 1.

[22] "• • • It must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, example: if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russell* v. *Place*, 94 U. S. 606, 608 (1877).

[23] Where judgment is given for a party on alternative grounds, either of which is sufficient to support the judgment, the judgment is conclusive as to both grounds. *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143 (1881); Restatement, Judgments (1942) 307; Scott, *Collateral Estoppel by Judgment* (1942) 56 Harv. L. Rev. 1, 11-12.

These views are submitted in an *amici curiae* brief as the only presently available method of bringing this vital and practical issue before the Court in this typical case. Prior to the time that the District Court made its findings of fact, the *amici curiae* could not know that the court would only select examples [24] to establish liability and would not make sufficiently detailed findings. Therefore, we had no reason to ask for intervention. Indeed the statutes do not demand as a price of protection, the rigid requirement of specialized legal talent to observe each step of the Government suit under penalty of loss of the benefits of section 5 due to objective inadequacy of the District Court's action. Nor was it feasible for the *amici curiae* to intervene after the findings had been made in order to make the appropriate motion to amend under Rule 52(b) of the Federal Rules of Civil Procedure. The ten days provided by Rule 52(b) of the Federal Rules for motions to amend the findings were hardly sufficient time to permit the *amici curiae*, who were not familiar with all the evidence, to detail the findings which they wished and to submit an appropriate motion to the District Court. Moreover, the District Court's power to grant intervention is wholly discretionary,[25] and the permissive intervention theoretically possible in a Government suit again burdens a clear right with seemingly needless and premature legal action by private persons, whose injuries have moved the Government to sue. As was indicated in *Allen Calculators* v. *National Cash Register Co.*, 322 U. S. 137, 141-42 (1944), intervention in the District Court by a private party in a Government suit under the antitrust laws may unduly delay and prejudice the adjudication of the rights of the original parties. *A fortiori*, the

[24] See, *e.g.*, amended findings numbers 9 at R. 3215-16, 10 at R. 3217, 17 at R. 3220-22, 18 at R. 3222, 19 at R. 3222, and especially 27 at R. 3224-25.

[25] See Rule 42(a) of the Federal Rules of Civil Procedure; *Allen Calculators* v. *National Cash Register Co.*, 322 U. S. 137 (1944); *United States* v. *California Canneries*, 279 U. S. 553 (1929).

amici curiae should not be obliged to intervene at the appellate stage of such a case.[26]

The *amici curiae* have presented their views in this form in order not to delay or confuse the litigation by unnecessary and possibly ineffective motions for permissive intervention. We ask only for vindication of our rights and the aid of the Court in making section 5 of the Clayton Act a substantial and effective means of enforcing the antitrust laws. Indeed this Court, for another reason, has admonished the District Court to make full findings of fact in equity antitrust actions brought by the United States. *Interstate Circuit* v. *United States*, 304 U. S. 55, 56-57 (1938).[27]

The establishment of a standard for findings in these cases would be a salutory and much-needed guide from this Court.

Respectfully submitted,

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December, 1947.

[26] Such intervention will be permitted only under the most extraordinary conditions. See *United States* v. *St. Louis Terminal*, 236 U. S. 194 (1915).

[27] "A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the courts appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case * * * and compliance with the rule is particularly important in an anti-trust case which comes to this Court by direct appeal from the trial court."